ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. CHRISTOPHER KENNEY, Defendant-Appellant.	: : : : : : : : :	Case No. 10-1674 On Appeal from the Franklin County Court of Appeals Tenth Appellate District Case No. 09-AP-000231

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CHRISTOPHER KENNEY

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Christopher Kenney was convicted and sentenced to nearly sixty years of incarceration based on the statements of one eight-year-old child. Those statements were admitted as the product of an insufficient competency hearing and an incorrect analysis of whether the taped child advocacy interview was testimonial. The reviewing court improperly determined that the statements were admissible by deeming that they were internally corroborative – i.e. the child's statement was corroborating evidence to support the child's other statement.

Evidence which Mr. Kenney could have used to defend himself against such disturbing allegations, evidence of the child's prior sexual abuse, was improperly kept out. In reviewing Mr. Kenney's claim, the appellate court applied the wrong standard, departing from this Court's decision in *State v. Gardner* (1979), 59 Ohio St.2d 14, to apply a rule of law from New Jersey. *State v. Budis* (N.J. 1992), 593 A.2d 784, 790.

The United States Supreme Court has noted the special danger that a child's testimony can present, particularly when that testimony is the sole evidence against the accused. *Kennedy v. Louisiana* (2008), ___ U.S. ___ , 128 S. Ct. 2641. The *Kennedy* Court declined to apply the death penalty in child rape cases because of "[t]he problem of unreliable, induced, or even imagined child testimony," which creates an additional risk of wrongful execution. Id. at 2663. "[C]hild rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed." Id.

This Court must grant jurisdiction and accept Mr. Kenney's case to make it clear to appellate courts that a child's own out-of-court statements cannot serve as corroborating evidence of that same child's incompetent in-court statements. This Court must also grant

jurisdiction to further develop Ohio's line of cases analyzing whether statements made in child advocacy centers are testimonial. Finally, this Court must grant jurisdiction and accept Mr. Kenney's case to address the improper application of an out-of-state legal standard to evidence of prior sexual abuse.

STATEMENT OF THE CASE AND FACTS

Christopher Kenney and his wife, Kyoko, do not have any children. Part of a large, close-knit family, Mr. Kenney had been hearing for years about his uncle's difficulties with drugs and its affect on his small children, Mr. Kenney's cousins. Those children were bounced around from foster home to foster home, occasionally being returned to their parents for sporadic periods. During a stay with a foster family, C.C. was found engaging in sexually inappropriate behavior and accused her older brother of touching her. She also had frequent nightmares and told one of her brothers that a "bad man" had raped her. That same brother later disclosed that his uncle had exposed him to pornography and raped him at his parents' home.

Finally, the Kenneys decided it was time to step in. In May 2004, Mr. Kenney and his wife agreed to take in the children, including four-year-old C.C. and her brother, two-year-old D.C. By the time the children arrived in the Kenney's home, they had called at least three other couples "mommy and daddy." C.C. lived with Mr. Kenney on several occasions between 2004 and 2007. In 2007, C.C. made allegations to a child services that Mr. Kenney sexually abused her. She also accused Mr. Kenney's father of abuse, but no criminal investigation was ever initiated.

On July 10, 2007, a Franklin County grand jury issued a fifteen-count indictment against Christopher Kenney, which included charges of rape, gross sexual imposition, and disseminating matter harmful to juveniles. Despite being offered an eight-year plea deal, Mr. Kenney asserted

his innocence and elected to go to trial.[1] Because C.C. was under ten at the time, a competency hearing was held. C.C. was found competent to testify following a brief evaluation in which the trial court asked her about her school, her brothers, and whether she knew the difference between the truth and a lie. At trial, C.C. testified to the allegations. The prosecution also played C.C.'s forensic interview at a child advocacy center for the jury. C.C.'s in-court testimony differed substantially from her prior interview.

Following trial, Mr. Kenney was found not guilty of Counts One, Two, and Three – which related to alleged events from when C.C. was four. He was convicted of all the remaining counts, and sentenced to an aggregate sentence of fifty-six and a half years of incarceration. Id. The trial court also classified him as a Tier III offender under the newly enacted Senate Bill 10, imposing registration duties and community notification for life.

Mr. Kenney timely appealed his conviction through appointed counsel. Appellate counsel raised ineffective assistance of trial counsel as related to C.C.'s cross-examination, sufficiency of the evidence, and the retroactive and ex post facto application of Senate Bill 10. This Court subsequently affirmed Mr. Kenney's conviction. *State v. Kenney*, 10th Dist. No. 09AP-231, 2009-Ohio-5584. Mr. Kenney subsequently raised the ex post facto application of Senate Bill 10 with this Court, and that case is being held in abeyance pending a decision in *State v. Williams*, Case No. 2009-0088; *In Re Smith*, Case No. 2008-1624; and *In Re Adrian R.*, Case No. 2009-Ohio-1089. *State v. Kenney*, Case No. 2009-2200.

Following his direct appeal, Mr. Kenney timely filed an App.R. 26(B) application for reopening, in which he raised the ineffective assistance of appellate counsel for failing to raise several winning issues on appeal. Specifically, Mr. Kenney asserted that C.C.'s competency

[1] Mr. Kenney was also offered a twelve-year plea before closing argument, which he similarly rejected.

hearing was deficient, which rendered her testimony inadmissible, as well as prosecutorial misconduct, and the ineffective assistance of counsel. Mr. Kenney also raised a violation of his right to confrontation when the trial court did not allow testimony of C.C.'s prior sexual abuse.

The Tenth District Court of Appeals agreed that C.C.'s competency hearing was insufficient and was not cured by subsequent trial testimony. *State v. Kenney*, 10th Dist. No. 09AP-231, 2010-3740, at ¶8. The admission of her testimony was improper, but the court held that her prior interview with the child advocacy center was "other compelling incriminating evidence," and therefore, Mr. Kenney was not prejudiced by the introduction of C.C.'s testimony. Id. Therefore, the court declined to find plain error. Id. at ¶9. The court declined to find prosecutorial misconduct, also. Id. at ¶16.

In addressing the prior sexual abuse, the reviewing court held that the proffered testimony about prior abuse did not present "clear proof" that the abuse occurred. Id. at 23. Finally, the court determined that trial counsel was not ineffective for failing to object to the competency hearing, as C.C.'s testimony was cumulative to her interview. Id. at ¶26. As a result, Mr. Kenney's Appellate Rule 26(B) application for reopening was denied. This timely appeal follows.

PROPOSITION OF LAW I

A taped child-advocacy center interview cannot serve as corroborating evidence of guilt when the child being interviewed has not been found competent to testify. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Section 10 and 16, Article I of the Ohio Constitution.

The Tenth District Court of Appeals agreed with Christopher Kenney that C.C., whose testimony was the only evidence against him, was given an insufficient competency hearing. *State v. Kenney*, 10th Dist. No. 09AP-231, 2010-Ohio-3740, at ¶6. As a result, the State failed to meet

its burden under *State v. Clark* (1994), 71 Ohio St.3d 466, 469, to prove that C.C. was competent to testify. Id. The appellate court further found that, because there were "significant conflicts between C.C.'s testimony and her interview at the Advocacy Center," C.C.'s insufficient competency hearing was not cured by subsequent trial testimony. Id. at ¶8. Moreover, the *Kenney* court found that "the trial court improperly allowed [C.C.'s] testimony." Id. However, the Tenth District Court of Appeals lost its way when it found that the error was harmless, because C.C's taped interview at the advocacy center corroborated her sex abuse claims. Id. That error denied Mr. Kenney a fair trial.

This Court must accept jurisdiction over Mr. Kenney's case to determine whether a taped advocacy center interview, which "significantly conflicts" with the child's in-court testimony, can be used to corroborate that child's story in light of an insufficient competency hearing. The *Kenney* court properly applied this Court's test in *State v. Frazier* (1991), 61 Ohio St.3d 247, 251, to find that C.C.'s competence was not established. But the *Kenney* court went astray from logic and common sense by holding that, despite the error, Mr. Kenney could not have been prejudiced. Considering that C.C.'s statements, both in-court and at the advocacy center, were the only evidence against Mr. Kenney, such a finding is both illogical and untenable.

In support of its opinion, the *Kenney* court relied on distinguishable cases, in which an insufficient competency hearing did not result in prejudice to the defendant because of other corroborating evidence. See, e.g., *State v. Douglas,* 10th Dist. No. 09AP-11, 2009-Ohio-6659, at ¶52 (finding the defendant's confession and the testimony of other child victims to be corroborating evidence of guilt). In the cited cases, the corroborating evidence was from sources other than the child victim, such as inculpatory medical evidence. In Mr. Kenney's case, there was no other evidence to support C.C.'s claims, other than her statements.

In effect, the *Kenney* court held that a witness' statements in court can be proven through that same witness' other statements. C.C.'s taped interview at the advocacy center had the same evidentiary weight as her testimony. As the *Kenney* court found that C.C.'s testimony was admitted in error, that same logic should have been extended to her taped interview. C.f. *Wong Sun v. United States* (1963), 371 U.S. 471, at syllabus (holding that a conviction must be set aside when there is a lack of competent evidence to support it). Failing to exclude C.C.'s testimony violated Mr. Kenney's constitutionally guaranteed right to due process and a fair trial. This Court must accept jurisdiction over Mr. Kenney's case and stop reviewing courts from transforming earlier statements into evidence with the same inculpatory weight and admissibility as objective medical or other evidence.

PROPOSITION OF LAW II

A child's incompetency to testify renders that child's previous advocacy center interview inadmissible when the interview was made for forensic or investigative purposes. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Section 10 and 16, Article I of the Ohio Constitution. *Davis v. Washington* (2006), 547 U.S. 813.

This Court has yet to address the admissibility of a child advocacy center interview following an insufficient competency hearing when the primary purpose of that interview was forensic in nature. In *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, this Court held that regardless of a child's competency to testify "the child's statements may be admitted at trial as an exception to the hearsay rule, pursuant to Evid.R. 803(4), if they were made for purposes of medical diagnosis or treatment." This Court's subsequent analysis in *State v. Arnold*, Slip Opinion No. 2010-2742, held that to determine whether a statement in a child advocacy center interview is testimonial, "we must identify the primary purpose of the statements." Statements

made to law enforcement agents for the primary purpose of forensic investigation are testimonial. Id., citing *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, at ¶2.

Here, the reviewing court held that the advocacy center interview could be considered "because it was admitted into evidence, and the issue of C.C.'s competence to testify has no impact on the admissibility of the interview." *Kenney*, at ¶8, citing *Muttart*, at ¶46. While it is correct that this Court's decision in *Muttart* allows for admission of the interview in light of an insufficient competency hearing, this Court limited *Muttart's* application to statements whose primary purpose was medical treatment or diagnosis. The *Kenney* court failed to apply *Muttart* correctly by analyzing the primary purpose of the statements under *Davis v. Washington* (2006), 547 U.S. 813.

a. The primary purpose of C.C.'s interview was forensic in nature.

Under *Davis*, statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. at 822. This Court adopted that reasoning in *Siler* and later developed it in *Arnold.*

The instant case is factually distinct from *Arnold*, and those distinctions must alter this Court's analysis of whether a child's statements violate the Confrontation Clause. In *Arnold*, there was no delay between the abuse and the reporting, as the child victim's mother walked in on the defendant and her child. Id. at ¶3. The mother immediately called 9-1-1 and took her child to Nationwide Children's Hospital where a rape kit was performed. Id. at ¶2-3. The very next day, the mother took her child to the affiliated child advocacy center for an interview. Id. at ¶5. In analyzing *Arnold*, this Court found that the child's statements as to what abuse took place assisted medical personnel in diagnosis and treating her. Id. at ¶6.

In Mr. Kenney's case, C.C.'s allegations of abuse were made in 2007, but her allegations related to sporadic periods in which the Kenneys took care of her, spanning from May 2004. Unlike *Arnold*, in which medical personnel were able to examine the child based on her earlier statements about the immediately proceeding abuse, C.C.'s examination happened long after when she alleged that the abuse occurred. No medical evidence corroborated her claims.

Because the abuse in *Arnold* occurred so close in time to the interview, and because medical personnel were then able to direct their examination based on the child's statements, and because the examination yielded evidence of abuse, the child's statements about the abuse were not forensic in nature. Id. at ¶39. Therefore, this Court deemed them nontestimonal and allowed their admission. But in the instant case, the abuse occurred in the more distant past. Although C.C. was physically examined as a matter of procedure for any child reporting abuse, the primary purpose of C.C.'s interview was not medical treatment. Rather, her interview was used as part of a criminal investigation against Mr. Kenney. Because so much time had elapsed that medical evidence of the abuse was not likely to be found, the primary purpose of C.C.'s interview was forensic, not medical.

This Court must accept jurisdiction in Mr. Kenney's case to further develop and explain the application of *Davis* to the lower courts. The instant case picks up where this Court left off in *Arnold*. It provides this Court with a crucial opportunity to strengthen and clarify the law relating to child advocacy center statements as they relate to admissibility and the constitutional right to confrontation.

PROPOSITION OF LAW III

An appellate court may not modify a ruling of the Ohio Supreme Court by adopting the ruling of another state's supreme court.

A court of appeals must follow this Court's decisions as binding authority until they are reversed or overruled. "It is a fundamental rule that 'Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness....'" *Battig v. Forshey* (1982), 7 Ohio App.3d 72, citing *Krause v. State* (1972), 31 Ohio St.2d 132, 148. Likewise, a court of appeals lacks discretion to adopt a rule modifying a previous rule of law established by this Court. *Franklin County Law Enforcement Ass'n. v. Fraternal Order of Police, Capital City Lodge No. 9* (1992), 80 Ohio App.3d 273, 275, citing *Thacker v. Bd. of Trustees of Ohio State Univ.* (1971), 31 Ohio App.2d 17, at syllabus. See, also, *State v. Mickens*, 10th Dist. Nos. 08AP-743, 08AP-744, 08AP-745, 2009-Ohio-2554, at ¶21.

> In other words, just as [the court of appeals] is not allowed to substitute its judgment for that of the trial court with respect to factual findings, [the court of appeals] is not permitted to substitute its judgment for that of the Ohio Supreme Court with respect to rules of law which have been announced by the Ohio Supreme Court in prior decisions.

Franklin County Law Enforcement Ass'n, at 275.

In the instant case, the Tenth District Court of Appeals departed from this Court's binding authority in creating a bifurcated review process for analyzing the admissibility of prior sexual abuse evidence. Instead of following this Court's prior ruling, the *Kenney* court adopted the New Jersey Supreme Court's analysis in *State v. Budis* (N.J. 1992), 593 A.2d 784, 790. By adopting a decision from another state, the court of appeals sidestepped this Court's authority and created its own rule of law. This Court must accept jurisdiction in Mr. Kenney's case in

order to make clear that Ohio's courts of appeals cannot modify this Court's binding authority to compliment their own viewpoints.

This Court provided the lower courts with a straightforward balancing test for assessing admissibility of evidence implicating the "rape-shield" law under R.C. 2907.02(D). *State v. Gardner* (1979), 59 Ohio St.2d 14, 17-18. The test requires courts to "balance the state interest which the statute is designed to protect against the probative value of the excluded evidence. Id. at 17. The rape-shield law is not always applied literally, because in some instances it infringes on a defendant's constitutional right to confront witnesses. Id. at 16-17. For example, evidence of a child's prior sex abuse may be admissible to prove to a jury an alternative source for a child's sexual knowledge. See, e.g., *State v. N.D.C.*, 10th Dist. No. 06AP-790, 2007-Ohio-5088.

Unlike this Court's long-standing balancing test in *Gardner*, New Jersey adopted a "clear proof" test, which requires that there be "clear proof" that the prior acts of sexual abuse occurred in order for that evidence to be admissible. *Budis*, at 790. Although *Budis* is nearly two decades old, and *Garner* has been good law for nearly a quarter of a century, two Ohio courts of appeals have recently adopted *Budis*' reasoning as a modification of the *Gardner* test. *Kenney*, at ¶20; *State v. Young*, 8th Dist. No. 92197, 2010-Ohio-3059, at ¶17 (following prior reversal in *State v. Young*, 8th Dist. No. 92197, 2009-Ohio-5354; *N.D.C.*, at ¶34).

PROPOSITION OF LAW IV

A criminal defendant is denied constitutionally guaranteed rights of confrontation, a fair trial, and due process when the trial court improperly excludes evidence of prior sexual abuse of the victim. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Section 10 and 16, Article I of the Ohio Constitution.

The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. *Chambers v. Mississippi* (1973),

410 U.S. 284, 294-295. A law must be set aside when it runs afoul of a defendant's right to confront the witnesses against him and his right to present a defense. *Davis v. Alaska* (1974), 415 U.S. 308.

Here, the reviewing court excluded key evidence about C.C.'s history of prior abuse by applying the wrong standard (See Proposition of Law III), by incorrectly holding that the evidence lacked probative value, and by relying on the State and defense counsel mentioning the prior abuse in opening and closing statements. *Kenney*, at ¶21-23. This Court must grant jurisdiction over Mr. Kenney's case to explain for the lower courts how to properly analyze prior sexual abuse evidence. Additionally, this Court must grant jurisdiction in order to hold that evidence of prior sexual abuse that is central to a defendant's case must be admitted to preserve that defendant's constitutional rights.

PROPOSITION OF LAW V

Trial counsel is constitutionally ineffective when that counsel fails to object to a deficient competency hearing. Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the Ohio Constitution; *Strickland v. Washington* (1984), 466 U.S. 688.

Mr. Kenney's trial counsel provided ineffective assistance of counsel because he failed to object to the pretrial competency hearing. (See Propositions of Law I and II). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance caused prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Here, the Tenth District Court of Appeals acknowledged that C.C.'s competency hearing was deficient. *Kenney*, at ¶7. But the reviewing court was misguided in holding that Mr. Kenney was not prejudiced by the admission of C.C.'s testimony. Id. at ¶26. Mr. Kenney was prejudiced by the admission and by counsel's failure to object, because that testimony was the only evidence against Mr. Kenney. (See Proposition of Law I). Its inclusion without an objection from trial counsel violated Mr. Kenney's constitutional right to the effective assistance of counsel. Therefore, this Court must grant jurisdiction and address the *Strickland* standard in the instant context.

CONCLUSION

This Court should accept Mr. Kenney's appeal because it raises substantial constitutional questions, involves a felony, and is of great public and general interest.

Respectfully submitted,

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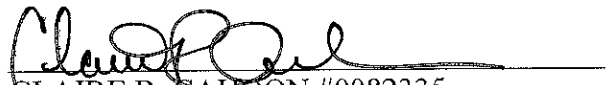
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was sent via regular mail to Barbara Farnbacher, Franklin County Assistant Prosecutor, 373 South High Street, 14th Floor, Hall of Justice, Columbus, Ohio 43215, on this 24th day of September, 2010.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Plaintiff-Appellee,	:	
	:	On Appeal from the Franklin
vs.	:	County Court of Appeals
	:	Tenth Appellate District
CHRISTOPHER KENNEY,	:	
	:	Case No. 09-AP-000231
Defendant-Appellant.	:	

APPENDIX TO
MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT CHRISTOPHER KENNEY

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-231
v.	:	(C.P.C. No. 07CR-07-4874)
Christopher M. Kenney,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 12, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Timothy Young, Ohio Public Defender, and *Claire R. Cahoon*, for appellant.

ON APPLICATION FOR REOPENING

FRENCH, J.

{¶1} Defendant-appellant, Christopher M. Kenney ("appellant"), seeks to reopen his appeal in *State v. Kenney*, 10th Dist. No. 09AP-231, 2009-Ohio-5584, which affirmed the judgment of the Franklin County Court of Common Pleas convicting him of disseminating matter harmful to juveniles, gross sexual imposition, and rape pursuant to

a jury trial. Appellant committed the offenses against his relative and foster child, C.C., when she was five and six years old. Id. at ¶2, 6. He was acquitted, however, of similar offenses alleged to have occurred when C.C. was four years old. Id. at ¶6. Plaintiff-appellee, the state of Ohio, opposes appellant's application. We deny it for the following reasons.

{¶2} App.R. 26(B) permits applications for reopening an appeal from a judgment of conviction and sentence based on a claim of ineffective assistance of appellate counsel. An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶3} To justify reopening, an applicant " 'bears the burden of establishing that there was a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of counsel on appeal.' " *State v. Hooks*, 92 Ohio St.3d 83, 84, 2001-Ohio-150, quoting *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704. The two-pronged analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, is the appropriate standard to assess whether an applicant has raised a genuine issue as to the ineffectiveness of his appellate counsel. *Hooks* at 84. Under this standard, ineffective assistance of counsel exists if counsel was deficient for failing to raise the

issues the applicant now presents and that, had the issues been presented, there was a reasonable probability of success. Id., citing *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶4} Appellant asserts that appellate counsel was ineffective for failing to raise the following proposed assignments of error:

> 1. The trial court violated Mr. Kenney's constitutional rights to due process and a fair trial in admitting the trial testimony of the child victim without a sufficient competency evaluation. Evid.R. 601(A); Fifth and Fourteenth Amendments, United States Constitution; Section 16, Article I, Ohio Constitution.
>
> 2. The prosecutor's misconduct denied Mr. Kenney a fair trial and due process of law. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution.
>
> 3. Mr. Kenney was denied his constitutional rights to confront witnesses, a fair trial, and due process of law when the trial court improperly excluded evidence of prior sexual abuse of the victim. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.
>
> 4. Trial counsel provides constitutionally ineffective assistance in failing to object to a deficient child competency hearing and prosecutorial misconduct. Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the Ohio Constitution; *Strickland v. Washington* (1984), 466 U.S. 688.

{¶5} In his first proposed assignment of error, appellant challenges the procedure by which the trial court found C.C. competent to testify. C.C. was under ten years old when she testified, and Evid.R. 601(A) provides that every person is competent to testify except children under ten years old "who appear incapable of

receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." The proponent of testimony from a child under ten years old bears the burden of proving that the witness is competent to testify. *State v. Clark*, 71 Ohio St.3d 466, 469, 1994-Ohio-43. In determining the competence of a witness under ten years old, the court must consider whether the child is able to (1) receive accurate impressions of fact or observe acts about which the child will testify, (2) recall those impressions or observations, (3) communicate what was observed, (4) understand truth and falsity, and (5) appreciate the responsibility to be truthful. *State v. Frazier* (1991), 61 Ohio St.3d 247, 251.

{¶6} Appellant argues that the competence hearing for C.C. failed to address her ability to recall and relate accurate impressions or observations of pertinent facts. Although the competence hearing need not involve questions about the alleged sex abuse, the child's ability to recall and relate events from the relevant time period must be established. *State v. Schmidt*, 10th Dist. No. 08AP-348, 2009-Ohio-1548, ¶19. Appellant committed sex offenses against C.C. when she was five and six years old, but the competence hearing involved no questions about whether C.C. could recall and relate accurate impressions or observations of past events within that time frame. Therefore, the hearing failed to establish C.C.'s competence to testify, and the prosecution, the proponent of C.C.'s testimony, did not satisfy its burden. Because appellant did not object to the trial court finding C.C. competent to testify after a deficient competence hearing, he forfeited all but plain error. See Crim.R. 52(B). Plain error exists when there is error, the error is an obvious defect in the trial proceedings,

and the error affects substantial rights, i.e., affects the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id. We now examine whether the trial court committed plain error by finding C.C. competent to testify after a deficient competence hearing.

{¶7} A deficiency in a competence hearing may be cured if the witness's subsequent trial testimony established competence. *Schmidt* at ¶23. In *Schmidt*, a competence hearing failed to establish whether a child witness could recall and relate events that occurred within the time frame of sex abuse. Id. at ¶22. This court examined whether the child's testimony established her competence and cured the deficient competence hearing. Id. at ¶22-26. We noted that the child contradicted herself during her trial testimony and that her testimony differed from her interview at the Center for Child and Family Advocacy ("Advocacy Center"). Id. at ¶24-25. Given these "significant" conflicts, the child's trial testimony did not cure the deficient competence hearing and, therefore, did not establish her competence to testify. Id. at ¶26-27.

{¶8} Here, there were significant conflicts between C.C.'s testimony and her interview at the Advocacy Center. Specifically, C.C. said at the Advocacy Center that appellant started to sexually abuse her when she was four years old and that cunnilingus was part of the sex abuse. *Kenney* at ¶4. But at trial, C.C. testified that cunnilingus was not part of the sex abuse and that she did not remember if the sex abuse happened when she was four years old. Id. at ¶3. Thus, pursuant to *Schmidt*,

C.C.'s trial testimony did not cure the deficient competence hearing and, therefore, did not establish her competence to testify. Consequently, the trial court improperly allowed her testimony. In any event, during the Advocacy Center interview, C.C. unequivocally implicated appellant in the sex offenses, and, in fact, her statements in the interview "bolstered her sex abuse claims." *Kenney* at ¶17. We consider the Advocacy Center interview because it was admitted into evidence, and the issue of C.C.'s competence to testify has no impact on the admissibility of the interview. *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, ¶46. Accord *State v. Douglas*, 10th Dist. No. 09AP-111, 2009-Ohio-6659, ¶52. Given this other compelling incriminating evidence, appellant was not prejudiced by C.C.'s improperly admitted trial testimony. See *State v. Lipsey*, 10th Dist. No. 08AP-822, 2009-Ohio-3956, ¶26 (concluding, under a plain error analysis, that improperly admitted evidence did not affect the outcome of a trial because the prosecution presented other ample evidence to support a defendant's conviction); *Douglas* at ¶44-46 (declining to disturb a defendant's conviction, despite a deficient competence hearing, because a child's testimony was cumulative to other evidence implicating the defendant, including the child's interview at the Advocacy Center).

{¶9} Accordingly, we conclude that the trial court did not commit plain error by finding C.C. competent to testify after a deficient competence hearing. Thus, appellant's first proposed assignment of error is not well-taken, and appellate counsel was not ineffective for failing to raise the competency issue.

{¶10} In his second proposed assignment of error, appellant asserts that the prosecutor committed misconduct during opening and closing statements. We disagree.

{¶11} The test for prosecutorial misconduct is, first, whether the conduct is improper, and second, whether the conduct prejudicially affected the substantial rights of the accused. *State v. White*, 82 Ohio St.3d 16, 22, 1998-Ohio-363; *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶66. The prosecutor's conduct cannot be grounds for a new trial unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 405. In considering prejudice, we must consider the following factors: (1) the nature of the remarks; (2) whether counsel objected; (3) whether the court gave corrective instructions; and (4) the strength of the evidence against the defendant. *Saleh* at ¶66. Appellant did not raise prosecutorial misconduct at trial and, therefore, forfeited all but plain error. See *State v. Williams*, 79 Ohio St.3d 1, 12, 1997-Ohio-407 (applying the plain error standard to a forfeited prosecutorial misconduct claim). Prosecutorial misconduct allows for a reversal under the plain error standard if it is clear that the defendant would not have been convicted in the absence of the improper conduct. *Saleh* at ¶68.

{¶12} Appellant first argues that the prosecutor improperly vouched for C.C.'s credibility during opening statements by claiming that she was not lying. To be sure, prosecutors are not permitted to express their personal beliefs about the credibility of witnesses. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶117. A prosecutor is permitted, however, to make a fair comment on the credibility of witnesses when the

comment is rooted in evidence. *State v. Dennis*, 10th Dist. No. 08AP-369, 2008-Ohio-6125, ¶15. Here, the prosecutor explained that the jury would hear "details" that support the allegations. (Tr. 89.) And, the prosecutor indicated that C.C. is "very clear about who" abused her. Id. Similarly, the prosecutor noted that C.C. is "here to tell you what happened and who did it to her. She said that two years ago. She'll say it again now." (Tr. 90.) Thus, the prosecutor did not improperly vouch for C.C.'s credibility.

{¶13} Next, appellant claims the prosecutor committed misconduct when she evoked the biblical story of David and Goliath during opening and closing statements and compared C.C. to the former and appellant to the latter. Pursuant to *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶106, 115, the prosecution enjoys wide latitude during opening and closing statements, and we conclude that the prosecutor did not exceed that leeway here. For instance, the prosecutor used the story to emphasize appellant's opportunity to abuse C.C. by taking advantage of his position of authority as an adult parental figure and that, in the end, justice will prevail for C.C. because the evidence supports her allegations. Accordingly, the prosecutor did not commit misconduct by using the David and Goliath analogy.

{¶14} Appellant also challenges the prosecutor's closing statement that it was a "tactic" for the defense to concede that C.C. had been abused by someone in her life. (Tr. 618.) Appellant does not establish how that statement was inflammatory, however, and we find nothing improper about it. Instead, the statement about the concession provided background for the prosecutor's argument that C.C.'s allegation of sex abuse "is undeniable." Id.

{¶15} Additionally, appellant contends that the prosecutor pandered to the jury's emotions by referring to C.C.'s foster care history, but the prosecutor was highlighting that C.C. had "no biological parents looking out for her" to protect her from harm. (Tr. 90.) Lastly, appellant claims that the prosecutor improperly stated that C.C. was relying on the jurors to believe her when no one else would. The prosecutor did not say that no one believed C.C., however, and, instead, asserted that the jury had reason to believe her because, based on the evidence, appellant "is guilty beyond a reasonable doubt." Id.

{¶16} Accordingly, under the plain error standard, we conclude that the prosecutor did not commit misconduct during opening and closing statements. Therefore, appellant's second proposed assignment of error is not well-taken, and appellate counsel was not ineffective for failing to raise prosecutorial misconduct.

{¶17} In his third proposed assignment of error, appellant contends that the trial court abused its discretion by excluding evidence that C.C. suffered sex abuse from other perpetrators. We disagree.

{¶18} Ohio's rape shield laws prohibit the introduction of evidence pertaining to a victim's sexual activity except to prove the victim's past sexual activity with the offender or the origin of semen, pregnancy or disease. See R.C. 2907.02(D) (applying to rape prosecutions) and R.C. 2907.05(E) (applying to gross sexual imposition prosecutions). Although those exceptions do not apply here, the rape shield laws cannot be applied to infringe on appellant's constitutional right to present a defense. See *State v. Gardner* (1979), 59 Ohio St.2d 14, 16-17. Accord *State v. N.D.C.*, 10th Dist. No. 06AP-790,

2007-Ohio-5088, ¶21 ("*N.D.C. I*"). To determine whether the rape shield laws are unconstitutional as applied, a court must balance the state's interest in their application against the probative value of the defendant's proposed evidence. *Gardner* at 17. Legitimate state interests advanced by the rape shield laws include the following: guarding the victim's sexual privacy; preventing the victim from undue harassment; and excluding inflammatory, prejudicial, and marginally probative evidence. *N.D.C. I* at ¶23.

{¶19} Appellant objected to the trial court's decision to exclude evidence of C.C.'s prior sex abuse, and, therefore, we consider whether the trial court abused its discretion. See *State v. N.D.C.*, 10th Dist. No. 08AP-217, 2008-Ohio-6120, ¶9 ("*N.D.C. II*") (noting that it is within the sound discretion of the trial court to determine whether to apply rape shield laws). An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶20} Despite the rape shield laws, evidence of a child's prior sex abuse may be admissible to dissuade a jury from concluding that a defendant must be guilty of sex offenses being prosecuted, given the extraordinary sexual knowledge of a child victim of tender years. See *N.D.C. I* at ¶35, citing *In re Michael* (1997), 119 Ohio App.3d 112, 121. Through the evidence of a child's prior sex abuse, the defendant attempts to exonerate himself by showing that the child's sexual knowledge was attributable to another person's misconduct. Id. There must be " 'clear proof' " that the prior acts occurred, however. Id. at ¶34, quoting *State v. Budis* (N.J.1991), 593 A.2d 784, 790.

{¶21} Appellant first challenges the trial court's decision to bar him from eliciting testimony from Linda Reardon, an earlier foster parent, that C.C. accused her older brother, T.C., of gross sexual imposition. But appellant was not prejudiced from this decision because C.C. made the accusation in the Advocacy Center interview, and the prosecutor conceded this fact to the jury during closing argument. Furthermore, during opening statement, appellant's trial counsel was permitted to assert that C.C.'s sexual knowledge stemmed from T.C.'s inappropriate sexual contact with her.

{¶22} Next, appellant argues that the trial court improperly excluded proffered testimony from T.C. that he was forced to watch pornography while living with C.C. in their parents' home. But T.C. did not indicate that C.C. also saw the pornography. Therefore, the proffered testimony had no probative value to appellant's defense, and the trial court did not abuse its discretion by excluding it.

{¶23} Lastly, appellant challenges the trial court's decision to exclude T.C.'s proffered testimony that, while he and C.C. were living with Reardon, C.C. had nightmares about being molested, and when she woke up from one nightmare she told her brother that a "bad man" raped her. (Tr. 452.) Appellant claims that the trial court did not balance the competing parties' interests, as required in *Gardner*, when it excluded the testimony. The court engaged in this analysis, however, by noting that the evidence would have confused the jury and that its prejudicial nature outweighed any relevance. The court's analysis was correct because the proffered testimony did not provide clear proof that someone other than appellant raped her. For instance, appellant attempted to draw an inference that C.C.'s uncle, Timothy Earles, raped her

because that man had raped T.C., but C.C. did not mention Earles in her statement to T.C. and, instead, made a vague reference about a "bad man." The record also weighs against appellant's claim that C.C.'s sexual knowledge about rape is not attributable to him. C.C. actually bled and felt pain from appellant raping her. *Kenney* at ¶17. Likewise, appellant engaged in furtive conduct reflective of a consciousness of guilt by telling C.C. to keep the abuse a secret. Id. Thus, the trial court did not abuse its discretion by excluding proffered testimony about C.C.'s nightmares and statement to T.C. about being raped by a "bad man."

{¶24} Consequently, appellant's third proposed assignment of error is not well-taken. Therefore, appellate counsel was not ineffective for failing to challenge the trial court's decision to exclude evidence that C.C. suffered sex abuse from other perpetrators.

{¶25} In his fourth proposed assignment of error, appellant argues that his trial counsel was ineffective for not asserting prosecutorial misconduct. But we have found no prosecutorial misconduct, and, therefore, trial counsel was not ineffective for failing to raise the issue. *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶72 (noting that counsel is not ineffective for failing to raise non-meritorious claims).

{¶26} Next, appellant argues that his trial counsel was ineffective for not objecting to the trial court allowing C.C. to testify after a deficient competence hearing. But we have concluded that appellant was not prejudiced by this factor because C.C.'s trial testimony was cumulative of other evidence. Thus, trial counsel was not ineffective for failing to raise the competency issue. See *Strickland* at 687, 104 S.Ct. at 2064

(stating that a defendant claiming ineffective assistance of counsel must show that his defense was prejudiced). Accordingly, appellant's fourth proposed assignment of error is not well-taken, and appellate counsel was not ineffective for failing to raise the claims of ineffective assistance of trial counsel that appellant now asserts.

{¶27} In conclusion, because appellant's proposed assignments of error are not well-taken, he has failed to meet his burden to demonstrate that there is a genuine issue as to whether he was deprived the effective assistance of appellate counsel. Consequently, we deny appellant's App.R. 26(B) application to reopen.

Application to reopen denied.

KLATT and McGRATH, JJ., concur.